

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, October 28, 2009 7:55 AM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: JoElla L. Julien; Robert L. Kehr; Mark Tuft; Kevin Mohr G; Harry Sondheim
Subject: RRC - 1.18 - III.A. - 11/6-7/09 Meeting Materials
Attachments: RRC - 1-18 - Compare - Rule & Comment Explanation - DFT1 (10-26-09)KEM.pdf; RRC - 1-18 - Dashboard - PUBCOM - DFT1 (10-26-09).pdf

Greetings Lauren:

I've attached the following for Rule 1.18, in PDF:

1. Dashboard, Draft 1 (10/27/09).
2. Rule & Comment Comparison Chart, Draft 1 (10/27/09)KEM.

KEM Notes:

1. My co-drafters have not had an opportunity to review the attached materials, so any errors or misconceptions you find in the attached are mine alone. My apologies to the co-drafters.
2. On the Dashboard, I've denominated the rule as not controversial. I believe that every state that has considered Ethics 2000 has adopted some version of MR 1.18. I suspect that some members of the Commission will view it as at least moderately controversial but we can discuss it during the meeting.
3. On the Rule & Comment Chart:
 - a. The chart is based on Draft 3.3 (10/26/09) of proposed Rule 1.18. It is the first draft the Commission will have seen since Draft 2.1, which was dated 5/17/08. There have not been any substantive discussions concerning this Rule since the 6/13/08 Meeting. After that time, the Rule was placed on the agendas for the 8/29-30/08, 9/26-27/08, and 5/8-9/09 meetings. Except for the 9/26-27/08 meeting, when there was an overarching discussion on screening that did not include any discussion of the details or Rule 1.18, deliberations of the Rule were continued to a future meeting.
 - b. There are no explanations in the third column because there remain some issues concerning the Rule and the only Comment that has been discussed to date is Comment [1], but it has yet to be approved.
 - c. To the extent that there are remaining issues concerning the Rule, I've identified them in the footnotes. See footnotes 9, 16, 17.

d. Because the Commission has not yet voted on any comment, all of the comments in the attached chart are still at issue.

e. There is one suggestion I've made that I ask the drafters and other members to consider carefully. That is including cross-references to the discussions of "substantially related" and "materially adverse" in proposed Rule 1.9. See my proposed Comment [6].

Please let me know if you have any questions. Again, my apologies to my co-drafters for not getting this to them sooner.

Thanks,

Kevin

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Proposed Rule 1.18 [N/A] “Duties to Prospective Client”

(Draft # 3.3, 10/26/09)

Summary: Proposed Rule 1.18 closely tracks Model Rule 1.18 and clarifies the duties a lawyer owes to prospective clients consult with the lawyer to seek representation. There is no California Rule counterpart, but the duty to protect confidential information of a prospective client, even if no attorney-client relationship results, is found in Evid. Code § 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule

Statute

Evid. Code § 951

Case law

People v. Gionis (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.</p>	<p>(a) A person who discusses with, directly or through an authorized representative, consults a lawyer <u>for the possibility purpose of forming a client-retaining the lawyer relationship with respect to a matter or securing legal service or advice from the lawyer in the lawyer's professional capacity.</u>¹ is a prospective client.</p>	
<p>(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except</p>	<p>(b) Even when no client-lawyer-client relationship ensues, a lawyer who has had discussions <u>or communications</u>² with a prospective client³ shall not use or reveal <u>confidential</u>⁴ information</p>	

* Proposed Rule 1.18, Draft 3.3 (10/26/09). Redline/strikeout showing changes to the ABA Model Rule

¹ **RRC Action:** At the 6/13/08 meeting, use of the language in paragraph (a) as drafted was deemed approved. See 6/13/08 KEM Meeting Notes, III.C., at ¶. 4.

² **Drafters' Recommendation:** One of the drafters (Kehr) has suggested following the lead of Connecticut and adding "or communications" after the word "discussions" in paragraph (b) so as not to limit paragraph (b)'s application to "discussions" as opposed to other forms of communication. KEM agrees.

³ **RRC Action:** At the 6/13/08 meeting, a motion to keep the Model Rule language "prospective client" throughout the Rule and explain in a comment that it includes "an authorized representative" was made, but no vote was taken. The Chair instead deemed the motion approved and directed the drafters to proceed as outlined in the motion. See 6/13/08 KEM Meeting Notes, III.C., at ¶. 4.c.

Drafters' Note: See Comment [1].

⁴ **RRC Action:** At the 6/13/08 meeting, the RRC voted 9-0-1 to insert "confidential" before "information" in paragraph (b). See 6/13/08 KEM Meeting Notes, III.C., at ¶. 6. The rationale for doing so is found in the 4/20/08 Kehr E-mail to Drafters, #2.

⁵ **RRC Action:** At the 6/13/08 meeting, the RRC approved by an 8-1-2 vote the drafters' preferred approach to keep the Model Rule language and explain the concept of "in the consultation" in a comment. See 4/25/08 KEM Meeting Notes, III.C., at ¶.2. One of the drafters had observed that the term, "in the consultation," might be read as limiting the Rule to information the lawyer learned directly in the discussions with the potential client or its representative. This would have the consequence of excluding from the scope of the Rule any information the lawyer learned in other ways while investigating the matter and determining whether to accept the representation. See comment [3], below.

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.18 Duties to Prospective Client</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>as Rule 1.9 would permit with respect to information of a former client.</p>	<p>learned in the consultation,⁵ except as Rule 1.9 would permit with respect to information of a former client.</p>	
<p>(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as</p>	<p>(c) A lawyer subject to paragraph (b) shall not represent⁶ a client with interests materially adverse to those of a prospective client⁷ in the same or a substantially related matter⁸ if the lawyer received information from the prospective client that could be significantly harmful <u>material</u>⁹ to that person in the matter,</p>	

⁶ **Drafters' Note:** To conform this Rule to proposed Rule 1.9, for which the RRC voted to use the Model Rule language, "represent," rather than the current California style, "accept or continue the representation of ..." See 2/29/08 KEM Meeting Notes, at III.G., at ¶. 7. Because the drafters of that Rule were also directed to include in a comment that "represent" includes both "accepting" and "continuing" to represent, Id. at ¶. 7.b., we have included a similar comment here. See comment [4], below.

⁷ **Drafters' Note:** Jerry Sapiro requested that we make explicit in the comment that paragraph (c) requires that the lawyer withdraw from representing both the current and the prospective client. See 2/26/08 Sapiro E-mail, #4. See also 2/29-3/1/08 KEM Meeting Notes, at III.K., ¶. 7. That is not necessary. First, paragraph (c) only applies if the lawyer is governed under paragraph (b), i.e., "when no lawyer-client relationship ensues." Second, this Rule is intended to protect the interests of the prospective client in his or her information and paragraph (c) accomplishes that. The interests of the current client against the lawyer representing a prospective client are protected under Rule 1.7. The interests of a former client against the lawyer representing a prospective client are protected under Rule 1.9. Jerry Sapiro continues to disagree. See 8/24/08 Sapiro E-mail to RRC List, #2.

⁸ **Consultant's Note on "substantially related":** This terminology was approved for proposed Rule 1.9 and we have continued to use it here. Rather than restate the lengthy comment to Rule 1.9 in the Comment to this Rule, we recommend simply cross-referencing those comments. See Comment [6], which also cross-references the discussion of "materially adverse" in Rule 1.9.

⁹ **Drafters' Note/Recommendation:** The term "**significantly harmful**" is derived from Restatement § 15. See footnote **Error! Bookmark not defined.**, above, for the rationale for this heightened standard for triggering a disqualifying conflict in the prospective client context. That rationale is mirrored in Rest § 15, comment c:

A prospective client's assurance of confidentiality through prophylactic prohibition as broad as that required in the case of a former client under § 132 must yield to a reasonable degree to the need of the legal system and to the interests of the lawyer and of other clients, including the need of a lawyer to obtain information needed to determine whether

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<p>provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).</p>	<p>except as provided in paragraph (d). If a lawyer is disqualified<u>prohibited</u>¹⁰ from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).¹¹</p>	

the lawyer may properly accept the representation without undue risk of prohibitions if no representation ensues. Thus, under Subsection (2), prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter.

Recommendation: We recommend substituting “material to the matter” for “significantly harmful to that person in the matter.” The “material confidential information” standard of current rule 3-310(E), would appear to encompass “significantly harmful” within its scope, at least as that standard has been interpreted and applied in recent California case law concerning the substantial relationship test. See, e.g., *Jessen v. Hartford General Casualty Co.*, 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877, 884-885 (2003). See also *Knight v. Ferguson*, 149 Cal.App.4th 1207, 57 Cal.Rptr.3d 823 (2007); *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007); *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006); *Farris v. Fireman’s Fund Ins. Co.*, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004); *Brand v. 20th Century Ins. Co.*, 124 Cal.App.4th 594, 21 Cal.Rptr.3d 380 (2004).

¹⁰ **Drafters’ Note:** As we have done in other rules relating to conflicts of interest, we have substituted “prohibited” for “disqualified”.

¹¹ **Imputation.** The second sentence of paragraph (c) functions the same as Model Rule 1.10(a) does for MR 1.9 – it imputes the conflict of the lawyer who engaged in the preliminary consultation to all other members of the lawyer’s firm.

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<p>(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:</p>	<p>(d) When the lawyer has received disqualifying information <u>prohibiting representation</u>¹² as defined in paragraph (c), representation <u>of the affected client</u>¹³ is permissible if:</p>	
<p>(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:</p>	<p>(1)¹⁴ both the affected client and the prospective client have given informed <u>written</u> consent,¹⁵ confirmed in writing, or:</p>	

¹² **Drafters' Note.** One drafter suggested deleting the word "disqualifying" in order "to avoid confusion that this rule is limited to the disqualification context." See 4/22/09 Tuft E-mail, #14. At least one other drafter (KEM) did not see a risk of confusion, noting that the word "disqualify" can also be interpreted to mean "preclude," as in "the previous consultation with A precluded L from representing B against A in that matter." Nevertheless, the Model Rule language has been modified as in other rules (e.g., Rule 6.5) to refer to "information prohibiting representation" rather than "disqualifying information."

¹³ **Drafters' Note:** Jerry Sapiro asked the drafters to clarify whether the introductory clause to paragraph (d) refers to the continued representation of an existing client, the prospective representation of a new client, or both and requests that the clause be revised to clarify what is intended. See 2/26/08 Sapiro E-mail, #5. See also 2/29-3/1/08 KEM Meeting Notes, at III.K., ¶. 8. We have specified that the paragraph refers to the "affected client," which is a **current** client of the firm. One Drafter (Kehr) does not see any need for a clarification.

¹⁴ The Ethics 2000 Reporter explained the intent of paragraph (d)(1):

Paragraph (d)(1) makes clear that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The expression of this requirement is parallel to that in Rules 1.7 and 1.9.

¹⁵ In keeping with the California approach to conflicts, the Model Rule consent requirement of "informed consent, confirmed in writing" has been changed to "informed written consent."

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<p>(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and</p>	<p>(2)¹⁶ the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and</p>	

¹⁶ **Drafters' Note/Consultant's Recommendation:** The Ethics 2000 Reporter explained the intent of paragraph (d)(2):

In the event that "significantly harmful" information is revealed, paragraph (d)(2) provides that the lawyer who received the information may be screened from any involvement in the subsequent matter, and others in the law firm may represent the adverse party, but only if the personally disqualified lawyer acted reasonably in attempting to limit that lawyer's exposure to potentially harmful information. (Emphasis added).

We've italicized the language at the end of the foregoing quote because in the Ethics 2000 Commission's draft initially submitted to the House of Delegates in August 2001, the requirement of the disqualified lawyer acting reasonably to limit his or her exposure to potentially harmful information was not part of the Rule. However, after the House of Delegates in August 2001 rejected the Ethics 2000 Commission's proposed screening provision in Model Rule 1.10, the Commission revisited the issue and added the language in an attempt to obtain the House's approval of screening in this limited situation. The Reporter's Explanation of Changes states:

Paragraph (d): Reinsert qualification to non-consensual screening – In light of the action taken by the ABA House of Delegates on proposed Rule 1.10 screening, and in light of the proposed Fox amendment to Rule 1.18 [i.e., to delete screening from Rule 1.18], the Commission reconsidered its earlier decision to delete the underlined language [i.e., "(2) the lawyer who received ... the prospective client; and"]. That language appeared in earlier drafts of the Rule, and the Commission had agreed to take it out on the ground that although it should be considered in a disqualification context, it was too vague for a disciplinary standard. The Commission now believes that the reinstated language states an important prerequisite to non-consensual screening in matters involving prospective clients.

The practical effect of including the introductory language to paragraph (d)(2) is apparently to ensure that the lawyer has some kind of conflicts checking mechanism in effect, or at least makes an attempt to clear conflicts before discussing the prospective client's matter in depth. We agree with Ethics 2000 on this.

Consultant's Recommendation: Adopt the Model Rule language. Although the Commission has deadlocked with respect to screening of private lawyers (as opposed to former or current government lawyers) in the former client situation generally, screening should be permitted where the lawyer took reasonable precautions to limit the prospective client's disclosure of information. At a minimum, this would go a long way to avoid the problem of "bad faith consultations," i.e., where a prospective client does not consult with a lawyer in a good faith effort to retain the lawyer but rather to preclude the prospective client's opponent from retaining the lawyer.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 1.18 Duties to Prospective Client</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p> <p>(ii) written notice is promptly given to the prospective client.</p>	<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p> <p>(ii) written notice is promptly given to the prospective client.¹⁷</p>	

¹⁷ **Drafters' Note/Recommendation:** Jerry has suggested that notice to the current client also be required. Because the notice is intended to permit the prospective client to monitor that the screen is effective and thus protects the prospective client's information, we don't think that is necessary. The law firm, however, would be obligated to at least communicate the existence of the screen under Rule 1.4. Perhaps we can add that in a comment, but we don't think we should require the same kind of notice be given to the current client. See proposed language in comment [6]. Jerry Sapiro disagrees w/ this approach. See 8/24/08 Sapiro E-mail, ## 5-6.

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.</p>	<p>[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, (and sometimes required), to proceed no further. Hence, prospective clients should receive <u>are entitled to</u> some but not all of the protection afforded clients. <u>As used in this Rule, prospective client includes an authorized representative of the client.</u>¹⁸</p>	
<p>[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).</p>	<p>[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who <u>by any means</u> communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship <u>or to discuss the prospective client's matter in the lawyer's professional capacity</u>¹⁹, is not a "prospective client" within the meaning of</p>	

¹⁸ Drafters' Recommendation: See footnote 3, above.

¹⁹ KEM/Question for Drafters: I've added language from paragraph (a), in turn derived from Evid. Code § 951, to this comment. A few choices: (1) instead of adding the language, substitute it for the Model Rule's "discuss the possibility of forming a client-lawyer relationship"; (2) include both as I have done (in concept if not the exact language); (3) leave the Model Rule language without enhancement. Do you have a preference? Mine is to use both because it better tracks the content of our paragraph (a) ("for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity")

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	<p>paragraph (a). <u>Similarly, a person who discloses information to a lawyer after the lawyer has stated his unwillingness or inability to consult with the person in the lawyer's professional capacity would not have a reasonable expectation. See <i>People v. Gionis</i> (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456].</u>²⁰</p>	
	<p><u>[2A]Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.</u>²¹</p>	

²⁰ **Consultant's Note:** I've added some language and a citation to *Gionis* because of member comments at the 2/29-3/1/08 meeting that this concept is important.

²¹ **KEM:** I've included this comment [2A] as a placeholder to determine whether Commission members think a definition of "consultation" would be helpful. I've taken this paragraph nearly verbatim from Cal. St. Bar Formal Ethics Op. 2003-161, Digest ¶. 4. That opinion dealt with the inadvertent formation of an attorney-client relationship and/or possible imposition of duties on a lawyer because of a meeting with a unsolicited prospective client outside the office and arguably is not applicable to this Rule, which appears to focus on pre-formation consultations with "invited" prospective clients. However, comment [2] to MR 1.18 does address the unsolicited client scenario and this or a similar comment, with its reference to 2003-161, might provide helpful guidance to lawyers on how to proceed in those situations.

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<p>[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.</p>	<p>[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. <u>Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing, or even can undertake.²² Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, Paragraph-paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.</u></p>	
<p>[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a</p>	<p>[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a</p>	

²² See note 5, above.

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<p>conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.</p>	<p>conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.²³</p>	
<p>[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.</p> <p>[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has</p>	<p>[5]²⁴ A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will <u>not</u> prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client. However, the lawyer must take reasonable measures to avoid exposure to more disqualifying information than is reasonably necessary to determine whether to represent the prospective client. Moreover, [6]—Even even in the absence of an agreement <u>with</u></p>	

²³ **Consultant's Note:** Originally, I recommended that this practice pointer comment be deleted. Jerry, however, has convinced me otherwise. 8/24/08 Sapiro E-mail to RRC List, #7.

²⁴ **Consultant's Note/Comment:** I would revise comment [5] as indicated and merge comment [6] with comment [5]. I think comment [5] as drafted, particularly the second sentence, is an invitation to lawyers to cherry-pick clients and turn on prospective clients who divulged more information than was necessary for the lawyer to determine whether to accept the representation.

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<p>received from the prospective client information that could be significantly harmful if used in the matter.</p>	<p><u>the prospective client</u>, under paragraph (c), the lawyer is not prohibited from representing either continuing or accepting the representation of²⁵ a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in <u>is material to</u> the matter.</p>	
	<p><u>[6]²⁶ For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6]. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment [7].</u></p>	
<p>[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met</p>	<p>[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed <u>written</u> consent, confirmed in writing,²⁷ of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of</p>	

²⁵ **Drafters' Note:** We were asked to explain in a comment that "represent" means either accepting or continuing the representation of a client. This is our attempt to do so. See note 6, above.

²⁶ **Consultant's Note:** See footnote 8, above. I recommend we cross-reference the discussion of "substantially related" and "materially adverse" in Rule 1.9.

²⁷ **Drafters' Note:** We have substituted "informed written consent" for "informed consent, confirmed in writing," to conform to standard California language.

<p align="center"><u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule <u>[1.0.1(k)]²⁸</u> (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	
<p>[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>	<p>[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given <u>to the prospective client</u> as soon as practicable after the need for screening becomes apparent. <u>In addition to the notice to the prospective client, the fact of the screen's implementation typically must be communicated to the affected client pursuant to Rule 1.4.²⁹</u></p>	
<p>[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.</p>	<p>[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.</p>	

²⁸ **Drafters' Note:** We've placed the reference to Rule 1.0(k) in brackets pending the Commission's decision whether to recommend its adoption.

²⁹ See note 17, above.

<u>ABA Model Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Commission's Proposed Rule</u> Rule 1.18 Duties to Prospective Client Comment	<u>Explanation of Changes to the ABA Model Rule</u>

**RRC – Rule 1.18 [MR 1.18]
E-mails, etc. – Revised (11/3/2009)**

October 18, 2008 Ruvolo E-mail to Drafters, cc Vapnek & Staff:	40
October 18, 2008 Julien E-mail to Drafters, cc Vapnek & Staff:	40
October 21, 2008 KEM E-mail to Difuntorum & McCurdy:.....	40
February 16, 2009 Melchior E-mail to RRC List:	41
April 21, 2009 KEM E-mail to Drafters (Kehr, Julien & Tuft), cc Chair & Staff:.....	42
April 21, 2009 Kehr E-mail to Drafters, cc Chair & Staff:	43
April 22, 2009 Tuft E-mail to Drafters, cc Chair & Staff:	45
April 23, 2009 Julien E-mail to Drafters, cc Chair & Staff:	46
April 24, 2009 KEM E-mail to Julien, cc Drafters, Chair & Staff:	46
April 25, 2009 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:	48
April 29, 2009 Sondheim E-mail to RRC:.....	49
June 13, 2009 Kehr E-mail to KEM, cc Chair & Difuntorum:	50
June 20, 2009 KEM E-mail to Kehr, cc Chair & Difuntorum:	50
August 27, 2009 McCurdy E-mail to KEM, cc Chair, Vapnek, Tuft & Staff:.....	51
October 28, 2009 KEM E-mail to Staff, cc Drafters (Julien, Kehr, Tuft) & Chair:	54
October 31, 2009 Julien E-mail to Drafters, cc Chair & Staff:.....	55
November 1, 2009 Sapiro E-mail to RRC List:	55
November 2, 2009 Tuft E-mail to RRC List:.....	57
November 2, 2009 Lamport E-mail to RRC:	58

August 27, 2009 McCurdy E-mail to KEM, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. III.S. Rule 7.1 Communications Concerning the Availability of Legal Services [1-400] (May 2009 Comparison Chart - Post Public Comment Rule Draft #7 dated 5/30/09)

Codrafters: Julien, Ruvolo

Assignment: (1) a "dashboard" cover sheet.

2. III.T. Rule 7.2 Advertising [1-400] (May 2009 Comparison Chart - Post Public Comment Rule Draft #7 dated 5/30/09)

Codrafters: Julien, Ruvolo

Assignment: (1) a "dashboard" cover sheet.

3. **III.U. Rule 7.3 Direct Contact with Prospective Clients [1-400] (May 2009 Comparison Chart - Post Public Comment Rule Draft #7.1 dated 8/10/09)**
Codrafters: Julien, Ruvolo
Assignment: (1) a “dashboard” cover sheet; and (2) a chart summarizing the public comment received and the Commission’s response. (1) a “dashboard” cover sheet; and (2) a chart summarizing the public comment received and the Commission’s response.
4. **III.V. Rule 7.4 Communication of Fields of Practice and Specialization [1-400] (May 2009 Comparison Chart - Post Public Comment Rule Draft #7 dated 5/31/09)**
Codrafters: Julien, Ruvolo
Assignment: (1) a “dashboard” cover sheet; and (2) a chart summarizing the public comment received and the Commission’s response.
5. **III.W. Rule 7.5 Firm Names and Letterheads [1-400] (May 2009 Comparison Chart; Post Public Comment Rule Draft #7 dated 5/31/09)**
Codrafters: Julien, Ruvolo
Assignment: (1) a “dashboard” cover sheet; and (2) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.A. Rule 1.18 Duties to Prospective Clients [N/A] (Draft #3.2 dated 4/24/09)**
Codrafters: Julien, Kehr, Tuft
Assignment: (1) a chart comparing proposed Rule 1.18 to MR 1.18; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
2. **IV.G. Rule 7.6 Contributions to Obtain Government Service [N/A] (at the July 2009 meeting, the Commission reconsidered a prior rejection of the rule and decided to assign a first draft rule in a comparison chart format)**

Codrafters: Martinez, Sapiro

Assignment: (1) a chart comparing proposed Rule 7.6 to MR 7.6; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

3. IV.P. Possible Rule re: Lawyer Acting as Lobbyists (no counterpart rules)

Codrafters: Julien, Peck, Ruvolo, Tuft

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

October 28, 2009 KEM E-mail to Staff, cc Drafters (Julien, Kehr, Tuft) & Chair:

Greetings Lauren:

I've attached the following for Rule 1.18, in PDF:

1. Dashboard, Draft 1 (10/27/09).
2. Rule & Comment Comparison Chart, Draft 1 (10/27/09)KEM.

KEM Notes:

1. My co-drafters have not had an opportunity to review the attached materials, so any errors or misconceptions you find in the attached are mine alone. My apologies to the co-drafters.
2. On the Dashboard, I've denominated the rule as not controversial. I believe that every state that has considered Ethics 2000 has adopted some version of MR 1.18. I suspect that some members of the Commission will view it as at least moderately controversial but we can discuss it during the meeting.

3. On the Rule & Comment Chart:

- a. The chart is based on Draft 3.3 (10/26/09) of proposed Rule 1.18. It is the first draft the Commission will have seen since Draft 2.1, which was dated 5/17/08. There have not been any substantive discussions concerning this Rule since the 6/13/08 Meeting. After that time, the Rule was placed on the agendas for the 8/29-30/08, 9/26-27/08, and 5/8-9/09 meetings. Except for the 9/26-27/08 meeting, when there was an overarching discussion on screening that did not include any discussion of the details or Rule 1.18, deliberations of the Rule were continued to a future meeting.
- b. There are no explanations in the third column because there remain some issues concerning the Rule and the only Comment that has been discussed to date is Comment [1], but it has yet to be approved.
- c. To the extent that there are remaining issues concerning the Rule, I've identified them in the footnotes. See footnotes 9, 16, 17.
- d. Because the Commission has not yet voted on any comment, all of the comments in the attached chart are still at issue.
- e. There is one suggestion I've made that I ask the drafters and other members to consider carefully. That is including cross-references to the discussions of "substantially related" and "materially adverse" in proposed Rule 1.9. See my proposed Comment [6].

Please let me know if you have any questions. Again, my apologies to my co-drafters for not getting this to them sooner.

October 31, 2009 Julien E-mail to Drafters, cc Chair & Staff:

I am not sure that I understand (c). Is it saying that the scenario goes something like this: A lawyer is representing a client and then begins conversations with a prospective client and lawyer finds that his conversation with the prospective client is adverse/material/or any such term, s/he must not continue to represent the client s/he represented in the first place? I am reminded of the saying "a bird in the hand is worth two in the bush". If I am reading this correctly, then it seems that the lawyer should not have to give up their current client, perhaps Jerry is right or some other resolution should be sought. Just what, I am not certain.

November 1, 2009 Sapiro E-mail to RRC List:

1. In the dashboard summary, line 2, I would insert the word "who" after the word "clients."
2. Paragraph (a) begins with the word "person." A rule may be interpreted literally. If it is, the word "person" does not necessarily include the word "organization." I would either add the phrase "or organization" to paragraph (a) or add a statement in the comment to the effect that as used in this rule, a "person" includes an organization. Another alternative, which I suggest regarding 1.0.1, is that we make this a universal definition.
3. In paragraph (b), I like the addition of the phrase "or communications." However, "discussions" is a subset of communications. I think the phrase "or communications" makes "discussions" redundant and would delete the phrase "discussions or".
4. Responding to footnote 5, I agree with the "one of the drafters" about the concern regarding the phrase "in the consultation." To me, the key is whether the information is communicated in confidence by the prospective client or is a secret of the prospective client, as we have discussed in respect to Section 6068(e). If is communicated in confidence or is a secret of the potential client, it should be protected, even if it is not communicated in a "consultation."
5. In paragraph (c), the Model Rule uses the word "information." However, I think that should be limited to "confidential" information. If a prospective client just tells me what I have already read from a newspaper article, that should not be disqualifying.
6. Responding to footnote 9, I agree with the drafters' recommendation.
7. The wording of paragraph (d) bothers me. The information received does not prohibit the representation. This rule prohibits the representation. In addition, I find the phrase "received information prohibiting representation" awkward. I think the introductory paragraph (d) should be reworded to state something along the lines of:

If a lawyer has received from the prospective client confidential information that is material to the matter, representation of the affected client is permissible if:
8. I think use of the word "affected" in paragraph (d) is acceptable, but when I read the paragraph I realized that someone who is not familiar with our intentions may not understand what the word "affected" means in this context. Similarly, in Comment 8, someone who is new to these rules may have difficulty understanding what that word means. I cannot think of a succinct substitute for the word "affected." I therefore recommend that we add to the comment a statement explaining what the phrase "affected client" means for the purpose of this rule.
9. Responding to footnote 7, I think the addition of a comment that paragraph (c) requires the lawyer who has received confidential information from the prospective client both to

withdraw from representing the existing client and not to represent the prospective client. I think this concept will not be obvious to lawyers who are not familiar with the interpretations of this rule [or with the interpretations of Rule 1.7]. It is counterintuitive to think that, even though I reject the prospective client as an actual client, I would have to withdraw from representing a current client. I think it is so important that we should make explicit that the lawyer is disqualified in each of the circumstance covered by paragraph (c). Otherwise, even a well-intentioned lawyer may be trapped into violating this rule, Rule 1.7, or Rule 1.9. Conversely, if we do not make the operation of this rule explicit in a comment, a creative lawyer may argue that we have created a rule that permits him or her to drop an existing client or to attack the work that the lawyer has done for a former client because this rule conflicts with Rules 1.7 and 1.9. If the interests of the current client or of the former client are adequately protected under Rules 1.7 and 1.9, we can point that out in a comment that shows how the rules relate to each other, but we should make explicit that the lawyer cannot favor either the prospective client or the existing or former client and must withdraw representing all, unless the lawyer complies with paragraph (d). Why hide the ball?

10. In subparagraph (d)(i) I would strike the word “disqualified.” As we have discussed in other contexts, such as Rule 1.11, disqualification is a matter for the courts and is not dictated by these rules. In that same paragraph, after the word “timely” I would add the phrase “and effectively.” A law firm should be required to create an effective screen before it may avoid imputation of the lawyer’s conflicts to other members of the firm.

11. In subparagraph (b)(ii), I would add the phrase “to enable the prospective client to ascertain compliance with the provisions of this Rule.” The purpose of the notice will dictate what its contents should be.

12. I agree with the additions to proposed Comment [2]. However, at page 8 of 13, line 3, I would add “or her” after the word “his.” In addition, I think the first complete sentence on page 8 ends too soon, but I cannot think of a good, succinct ending for it. The prospective client would not have a “reasonable expectation” of what? Perhaps something along the line of the phrase “that the lawyer is willing to consult” is appropriate, but I think that would be redundant with the beginning of the sentence.

13. I like the addition of proposed Comment [2A]. I suggest the addition of two other circumstances. First, most of the examples presume a meeting in which the consultation takes place. The communication may not be in a meeting and may be unilateral such as a cold telephone call from the prospective client. In addition, I often receive unsolicited letters from prisoners asking me to represent them. I uniformly send a rejection letter, but the disclosures in unsolicited letters of that type should not be disqualifying. For example, if a prisoner were to write to me and make substantial disclosures, but I already represented a co-defendant in the same case, I should not automatically be disqualified from representing my existing client.

14. In proposed Comment [3], in the new text, in the fourth line of that sentence, after the word “willing” I would insert the word “to,” followed by a commas so the phrase becomes “is willing to, or even can, undertake.”

15. In proposed Comment [4], at the top of page 10 of 13, the first complete sentence on the page only refers to Rule 1.7. However, the line after that reference also refers to “former clients.” I would change the phrase “under Rule 1.7” to “. . . under Rules 1.7 or 1.9. . . .”

16. Responding to footnote 23, I say, “Thank you Kevin.”

17. I agree with the recommendation in footnote 24.

18. I agree with the merger of Comments [5] and [6]. In the second line on page 12 of 13, I would add the phrase “and effectively” after the word “timely.”

19. I disagree with the last sentence of proposed Comment [5]. The conflicted lawyer should not participate in the proceeds of the case directly or indirectly. If he or she has a financial incentive to ignore the screen, the firm should not be able to avoid imputation.

20. Regarding Comment [8], I agree with the addition of the last sentence. However, I would delete the word “typically.” The client should expressly be told who is screened from the client’s case. Picture the client who has not “typically” been told, who calls in on the telephone, is told that the lawyer primarily responsible for his or her case is not available, and asks to speak with someone else. If he or she has not been told which lawyer is screened from the case, he or she might wind up discussing matters with the screened lawyer, not knowing about the conflict of interest.

21. Unfortunately, I do not have time to re-read our draft of Rule 1.1. Is the first sentence of Proposed Comment [9] still appropriate?

November 2, 2009 Tuft E-mail to RRC List:

My comments correspond to the numbers in Jerry's 11/1/09 email:

1. I agree.

2. I disagree that the term person does not include organizations and oppose departing from the Model Rule language for that purpose.

3. I agree with Jerry we should eliminate "discussions or" from paragraph (b) since we include the broader term "communications with." The phrase "who has had communications with" should be sufficient.

4. The concern raised in note 5 can be alleviated by changing "learned in the consultation" in paragraph (b) to "learned as a result of the consultation."

5. Since paragraph (c) has a materiality component I would not limit it further by adding "confidential" to "information."

6. N/A

7. I would stay closer to the Model Rule formulation by having paragraph (d) read: "When the lawyer has received information that prohibits representation as provided in paragraph(c) . . ."

8. The phrase "affected client" is commonly used and I would not change it or add a comment defining it.

9. Comment [6] is adequate to cover the point raised.

10. I agree with Jerry.

11. Ok.

12. I prefer the Model Rule language in Comment [2] to the revised comment. The revisions eliminate the important concept of putative client's communicating information unilaterally in an effort to taint lawyers that the other side might otherwise hire. There is no need to track the wording of the evidence code section verbatim in place of the Model Rule comment.
13. Comment [2A] goes too far in providing practice management advice. The citation to Gionis at the end of comment [2] is sufficient.
14. ok.
15. The reference to 1.7 in the Model Rules is correct, but may not be sufficient under our version of 1.7.
16. N/A
17. ok.
18. I would keep comments [5] and [6] separate for consistency and ease of reference.
19. I do not understand Jerry's point with respect to the last sentence in comment [5] as revised.
20. I doubt there is authority for the proposition that all affected current clients must be notified of an ethical wall imposed to protect information of a prospective client under rule 1.4. That might be good practice, but there are times when disclosure that a prospective client consulted with the lawyer will not be permitted. I am afraid that the law of unintended consequences could apply here and in absence of authority for this broad proposition, I would not include the last sentence in comment [8] as a mandatory duty.
21. I question how our version of rule 1.1 would apply in this situation.

November 2, 2009 Lampert E-mail to RRC:

I have the following comments:

1. Paragraph (d) Screening. I do not agree to with the recommendation that we adopt the Model Rule screening provisions. My views on screening have been stated on more than one occasion. I will not repeat them here. However, I will add the standard in (d)(2) is vague that it would lead to abuse. This rule talks about information being revealed for two purposes (i) to determine conflicts and (ii) to allow a lawyer to determine whether the lawyer is willing to or is capable of accepting the engagement. With respect to the first scenario, a lawyer can protect himself or herself by making it clear that only the information requested for the conflict search should be provided and that there should be no expectation of confidentiality with respect to any other information until the lawyer has run the conflict search. If the lawyer has taken the foregoing precaution, the lawyer should not have an issue that would call for screening. The additional information would not be confidential. If the lawyer hasn't taken that precaution and a prospective client reveals additional information with the objectively reasonable expectation that it would be held in confidence, screening would not be appropriate. In the second scenario, the lawyer is asking the client for more information and, unless there is an agreement that there is no confidentiality until the lawyer accepts the engagement, the lawyer has to accept the

consequences that come from asking for the information. I don't see a basis for screening in that situation unless the lawyer has obtained the prospective client's consent that nothing discussed is confidential, per Comment[5]. In either case, I don't see a justification for screening here.

In my view, paragraph (d)(2) is unclear about what precautions would qualify to allow screening. As written, it states that the measures relate to avoiding exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. Particularly with respect to the second of the two scenarios presented in the Comment, the prospective client could reveal very sensitive information just to allow the lawyer to determine whether to accept the engagement. If the lawyer shows that he or she took measures that prevent more information from being revealed, would that allow the lawyer to harbor that very sensitive information behind an unconsented and unverifiable screen, while the lawyer's firm represents the prospective client's adversary in the same matter about which the prospective client consulted the firm? How does this protect the client or promote public trust in the ability to consult a lawyer without fear of consequence? I do not see the justification for screening here.

2. Comment [2A]: I am not comfortable with this proposed Comment as written. First, it is the objectively reasonable expectation of the prospective client. The prospective client cannot be a legend in his or her own mind. Second, I think the factors listed do not directly address the primary considerations. I would revise the Comment to state:

"[2A] The existence of a prospective client relationship with a lawyer depends on the circumstance and the objectively reasonable expectations of the person contacting the lawyer in those circumstances. The key questions are (i) whether the person is communicating with the lawyer as a lawyer and the lawyer is responding in that capacity, (ii) whether the communications are for purpose of determining whether the lawyer is available to represent the client, and (iii) whether the person has a reasonable expectation that the communications with the lawyer are confidential and would not be revealed to adverse parties."

3. Comment [3]. A nit. Line 11, underlined text "one the lawyer is willing or able to undertake."

4. Comments [7] & [8]: For the same reasons I oppose (d)(2), I oppose the screening discussion in these Comments.